Soltech, Inc. *and* General Drivers, Warehousemen and Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL–CIO.[1] Cases 9–CA–27654, 9–CA–27837, and 9–CA–28055

January 31, 1992

DECISION AND ORDER

CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On July 31, 1991, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the judge's recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Soltech, Inc., Shelbyville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an adminsitrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We find the interrogations of employee Mark Sheckles, a known union adherent, by the Respondent's vice president, Rod Hill, unlawful under *Rossmore House*, 269 NLRB 1176 (1984). In this regard, we note that Hill was second in command at the facility and that Hill sought information as to the identity of the initiator of the union campaign.

Donald A. Becher, Esq., for the General Counsel.
Terry L. Potter, Esq., for Soltech, Inc.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Shelbyville, Kentucky, on May 1 and 2, 1991, pursuant to charges and amended charges filed on July 2, September 11, and November 26, 1990, and January 7, 1991, and a second consolidated complaint issued January 8, 1991. The complaint alleges Respondent has violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). Respondent denies it has violated the Act.

On the entire record, including the able posttrial briefs of the parties, and after carefully considering the testimonial demeanor of the various witnesses proffered by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in the manufacture of insulation products in Shelbyville, Kentucky. During the 12 months preceding the issuance of the second consolidated complaint on which this litigation is based, Respondent, in the course and conduct of these Shelbyville, Kentucky operators, sold and shipped goods and materials valued in excess of $50,000 directly from that location to points located outside the State of Kentucky. Respondent is, and has been at all times material to this proceeding, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. SUPERVISORS AND AGENTS

The complaint alleges, Respondent admits, and I find that at the times material to this proceeding the persons named below held the positions set forth opposite their names, and were supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act:

Thomas Nelson—President
Rod Hill—Vice President of Manufacturing
Jerry Rutter—Supervisor[1]
William Lyons—Supervisor

There will be reference to other individuals, during the course of this decision, who occupied management positions at times relevant and are found to be agents of Respondent within the meaning of Section 2(13) of the Act on the basis of their positions and responsibilities and their conduct clearly on behalf of Respondent.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that Respondent, by its agents Thomas Nelson and Rod Hill, made several statements to its employees violative of Section 8(a)(1) of the Act; warned and discharged Donna Etherton in violation of Section 8(a)(1) and (3); warned Mark Sheckles in violation of Section 8(a)(1) and (3); and discharged Mark Sheckles in violation of Section 8(a)(1), (3), and (4) of the Act. All of these instances are presented as part of a course of conduct stimulated by employee union activity and, in the case of Sheckles' discharge, the utilization of Board procedures. In addition to these allegations, the complaint alleges the pro-

[1] Neither Hill nor Rutter was an employee of Respondent at the time of the hearing before me.

mulgation and maintenance of an unlawful rule on distribution of literature which existed prior to the protected activity involved in this proceeding and has not been shown to have been unlawfully motivated or connected to the other matters involved herein. I have therefore treated the allegation concerning the rule as a matter separate from the other allegations.

A. *The Rule*

Respondent issued ''Company Rules and Regulations'' on or about February 9, 1990, containing a rule prohibiting ''Unauthorized distribution of literature, written or printed matter of any description.'' There is no evidence this rule was ever enforced.

On February 9, 1990, Respondent issued Company Rules & Regulations containing, among many other things, rule B-7 reading as the complaint alleges. This rule was modified in the Company Rules & Regulations, rule B-5 effective September 10, 1990, to prohibit:

> Unauthorized distribution of literature, written or printed matter of any description on working time or in working areas.

On January 23, 1991, Respondent issued a memo to all employees advising them of a modification of the rule to read as follows:

> Distribution of circulars, handbills or literature of any type during working time shall not be permitted, nor shall distribution of literature of any type be made in working areas at anytime.

That is the rule currently in effect.

General Counsel does not allege in the complaint or contend in his posttrial brief that either the September 10, 1990, or January 23, 1991, versions of the rule contravene the Act. Their validity is therefore uncontested. He relies only on the February 9, 1990, version as basis for his contention a violation of the Act occurred. That version is indeed far too broad a restriction on employee rights. There is no evidence of a permissible business reason for so restrictive a rule, and it is clearly an invalid ban on all unauthorized distribution by employees at any time or place within Respondent's facilities.[2] An employer simply may not require an employee to seek its permission to engage in protected concerted activity on the employee's own time and in nonwork areas.[3] The mere existence of so broad a rule, even though not enforced, carries with it a possibility of enforcement against statutorily protected activity and therefore reasonably tends to interfere with, restrain, and coerce employees in the exercise of their right to engage in such activity, and therefore violates Section 8(a)(1) of the Act.[4] Accordingly, I conclude and find the promulgation and maintenance of the February 9, 1990, rule violated Section 8(a)(1) of the Act. This, I believe, warrants a cease and desist order to guard against similar rules being issued by Respondent in the future, but no affirmative order to rescind the rule is required because it has been effectively rescinded by both the September 1990, and January 1991 rules which were communicated to all employees, and which General Counsel does not contest. In so concluding, I especially note that Respondent's memo to all employees on January 23, 1991, is headed ''Change in Company Rules,'' and states, introductory to the statement of the new rule, ''Certain parties have suggested there may be some confusion as to the Company's no-distribution policy. Although I believe you know our policy on this matter, our Company Rule B-5 (previously Company Rule B-7) will be modified to read as follows.'' Respondent has clearly advised its employees which rule is applicable, and it would now serve no purpose to require further affirmation to the employees that the February 1990 rule is no longer applicable.[5]

B. *Union Activity and Various Statements of Respondent's Agents*

Employees Mark Sheckles and Donna Etherton contacted Robert Winstead, assistant to the Union's president, in April 1990,[6] and requested him to commence organizing efforts at Soltech. In response to this request, Winstead passed out union literature on the road in front of Respondent's plant on or about April 20. By letter of June 21, Winstead requested Respondent to recognize the Union as the bargaining representative of Respondent's production and maintenance employees. Thomas Nelson, Respondent's president, denied the Union's request by letter of June 25, by which time the Union had, on June 22, filed a representation petition with the Board. Respondent received notification of the petition on June 26. That petition was dismissed on July 10. There is no evidence of subsequent union organizational efforts at Soltech.

Several of the alleged infractions of Section 8(a)(1) of the Act concern statements Thomas Nelson and Rod Hill are accused of making during group meetings with employees. As is often the case, the evidence adduced by the parties raises difficult credibility problems. The parties of course each want their witnesses credited in all significant respects. It is not that simple. Few, if any, of the witnesses can be fairly viewed as totally disinterested in the outcome of this proceeding. Failures of recall were widespread, whether actual or feigned in any specific situation is difficult, if not impossible, to ascertain. Generalities and conclusions ramble through the testimony, both pro and con. Individual witnesses were believable at some times but not others. Add to these not uncommon considerations the phenomenon that witnesses, particularly after the passage of time between event and trial, sometimes have the very human tendency to relate what they believe another person meant rather than what he or she said, and the uncertainty can be compounded. Moreover, some testimony elicited in response to leading questions has little probative weight because it amounts to mere agreement with statements by counsel rather than persuasive testimony by the witness. Compare *H. C. Thomson, Inc.*, 230 NLRB 808, 809 fn. 2 (1977). With these considerations in mind and after lengthy reflection concerning other record evidence tending to prove or disprove the point at issue, the probabilities in the circumstances, and the comparative testimonial demeanor of the witnesses, I have

[2] *Our Way, Inc.*, 268 NLRB 394 (1983).

[3] *Brunswick Corp.*, 282 NLRB 794 (1987).

[4] *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976); *Brunswick Corp.*, supra, and cases cited therein.

[5] Compare *Contra Costa Times*, 263 NLRB 566, 569 (1982).

[6] All dates are 1990 unless otherwise indicated.

reached the following findings of fact and conclusions based thereon.

There were several meetings of management with employees for various reasons including discussion about the Union. How many or just when is not clear with the exception of the one on the day following Winstead's handbilling, when Nelson convened a meeting with the first and third shifts. The reason for the meeting was the Union's appearance on the scene. The testimony concerning what was said varies. Sheckles recalls Nelson stating Soltech was not and would not be a union company, he would not negotiate with a union, and the Company might possibly move if the Union came in. Sheckles adds that when Nelson stated unions were bad for companies, and said the Union would take $40 a week from an employee's check in dues and could levy fines up to $5000, Sheckles stood up, denied the Union would take $40 a week, stated it was poor management rather than unions that put companies out of business, and said the employees felt they needed someone like union stewards to protect them. According to Sheckles, Nelson never called on him again at this meeting even though Sheckles repeatedly raised his hand.

According to Etherton, Nelson said there would be no negotiation with the Union, he would not have a union in the plant, he would move the plant, and he would shut the doors. She testified Nelson also said Respondent would have no contract with Whirlpool if it were a union plant, and pointed out problems with unions at Eastern Airlines and Greyhound. She remembers Sheckles speaking up that plant closures were due to bad management and were not caused by unions. She also recalls Nelson alluding to union dues of $40 a week.

James Hornbeck, a current employee and therefore not likely to deliberately fabricate false testimony against his employer,[7] recalls Nelson saying employees would probably pay $40 a month in union dues, a union could cause Respondent's plant to close, and, while exhibiting newspaper clippings concerning the closing of other companies, stating Whirlpool would not deal with companies that dealt with unions. Hornbeck confirms, as did Etherton, that Sheckles spoke up to say unions did not cause plants to close.

William Wisdom, a former employee, recollects Nelson saying he could close the plant and move it if he wanted, but speculates that Nelson could have been talking about a newspaper clipping concerning the moving of a Whirlpool plant and could have said a union does not mean job security. Wisdom further remembers Nelson saying Soltech could lose the Whirlpool contract if the Union came in, which caused Sheckles to speak up in favor of the Union. Wisdom agrees with Sheckles and others that Sheckles' comments were cut short.

Nelson denies making any of the statements concerning refusals to negotiate and plant closure or removal. He relates that he limited his remarks to advising employees to get all the information they could concerning union representation, using a newspaper report of two Kentucky plants closed by Whirlpool as an example of the facts available to employees and as a showing job security does not necessarily depend on the absence or presence of a union, and telling the employees the only thing Respondent had to do if they chose a union was to negotiate. He recalls being asked if the Company was moving to Tennessee, and answering there were no such plans. Nelson does not remember Sheckles speaking up at any meeting.

Rod Hill, no longer Respondent's employee but its vice president of manufacturing at the time of the events involved herein, professes a lack of specific memory but recalls that Nelson stated his position that the Company did not need a union and that company management would do everything it could to assure the Company ''could run in a non-union fashion.'' Hill opines Nelson may have said Whirlpool was closing a union plant and moving to a nonunion plant to make Nelson's point that union plants were closing and moving to nonunion locations. Hill remembers Sheckles speaking up, but only recalls part of Sheckles' comments to the effect the employees had no backbone and were afraid of getting fired.

David Cole, the plant manager, only remembers that Nelson set forth how unions worked and gave examples of how they had worked at other companies. He denies Nelson said there would never be a union or negotiations, or threatened plant removal.

Jerry Rutter, a former supervisor no longer Respondent's employee, says Nelson discussed efforts to organize and the presence of some people soliciting on Respondent's property, and Nelson told the employees they did not need a union because the Company had certain rules and benefits. Rutter does not remember Nelson saying there would never be a union in the plant or Respondent would not negotiate, nor does Rutter recall Nelson threatening to move the plant. Rutter concedes he has no good recollection of what was said at the meetings, but recalls unions and Whirlpool being mentioned.

Linda Davenport, Doris Clark, and Hazel LaMar were employee witnesses called by Respondent. Clark doesn't recall what went on at meetings because she used the time to do her paperwork. LaMar says she has a poor memory, does not recall much of what went on at meetings, and does not remember Nelson saying there would never be a union in the plant, he would not negotiate, or that the plant would be moved if employees selected the Union. Carpenter made identical denials to identical questions posed by Respondent, but affirmatively asserts that Nelson told employees not to worry because the Union was not coming in and, in response to an employee question, stated the Company was not going to be moved if the Union got in.

Nelson was not a very convincing witness on this topic. His assertion that he does not recall Sheckles getting up at any of the meetings, but he could have, because Nelson does not know all the employees' names is incredible. The evidence is convincing that Sheckles did speak up, as Hill acknowledges, and it is obvious from Nelson's recitation of later conversations with Sheckles, of which more later, that he is and was well aware of Sheckles' identity. Furthermore, his claim that he was reading a script approved by his counsel is incredible. The so-called script consists of handwritten notes reading as follows:

> Cards—Signing is a serious issue—get the facts—talk to people already in a union or that have been in a union.

[7] See, e.g., *Unarco Industries*, 197 NLRB 489, 491 (1972).

> Pamphlet—Remember promises can be made but nothing can happen without the company agreeing
>
> Teamsters—Left the scene last fall after it appeared they were losing—pulled their petition
>
> Obviously some people are upset at the company—but I would make my own decision if I were you—This issue affects us all
>
> Remember
>
> The Union can promise anything
>
> I can't. I can only state the facts
>
> If I were you I wouldn't sign this card until I had gotten all the facts
>
> If I were you I wouldn't believe rumors or promises
>
> Remember, the Union can promise you anything but they can only try toget what we are willing to give at the bargaining table. Wages could go up, go down or stay the same.

It is clear from his own testimony and that of the other witnesses to this meeting that Nelson wandered far from his skeletal notes into other areas. I seriously doubt counsel prepared these notes. In any event, even if counsel did prepare them, that is not evidence they were followed. Hill's assessment that Nelson was making the point union plants were closing and moving to nonunion locations; Wisdom's testimony that Nelson said he could close the plant and move it if he wanted; Hornbeck's memory that Nelson said a union could cause Respondent's plant to close; Sheckles recollection that Nelson said Respondent might move if the Union came in; and Etherton's testimony that Nelson said he would move the plant and shut the doors demonstrates that Nelson was intent on conveying and did convey the idea that plant closure could be the result of union organization. I believe it unlikely that Nelson would, as Etherton recalls, baldly threaten to move the plant. This, I conclude, is Etherton's interpretation of Nelson's message. I am persuaded that the testimony of Wisdom, Hornbeck, and Sheckles are closer to what Nelson really said. These three men were credibly relating what they recalled Nelson's statements to be. The differences between their testimony are not unusual variations, and their common message is that Nelson told employees Respondent could close or move its operations to avoid unionization. This, I find, is what Nelson meant to and did convey to the employees. I am not impressed by the bare denials of Respondent's witnesses to leading questions concerning whether or not Nelson made such threats, and those denials to questions so propounded are entitled to and given little weight. General Counsel's witnesses are the more believable on this point. Accordingly, I conclude and find that Respondent, by Thomas Nelson, did threaten its employees with plant closure and/or removal if they selected the Union to represent them, which reasonably tended to interfere with, restrain and coerce them in the exercise of the rights guaranteed them by Section 7 and violated Section 8(a)(1) of the Act.

Carpenter's testimony that Nelson told employees the Union was not coming in; Sheckles' testimony Nelson said Soltech was not and would not be a union company; and Etherton's recollection Nelson said he would not have a union in the plant, are consistent with Rod Hill's testimony that Nelson said Soltech did not need a union and would do everything it could to assure the Company could run in a nonunion fashion. I believe these are these individual's best recollections of a statement by Nelson, and I further believe that statement, whatever its formulation was designed to and did notify employees that efforts to secure union representation would be futile. By so stating, Nelson again violated Section 8(a)(1) of the Act.[8]

Sheckles credibly testified, corroborated by Etherton, that Nelson said he would not negotiate with a union. Testimony to the contrary is largely composed of denials to leading questions and is not credited. Nelson's statement violated Section 8(a)(1) for the same reason his statement to the effect there would be no union at Soltech did.

Notwithstanding the foregoing findings adverse to Nelson's testimony, I credit his recollection that, in response to an employee question, he said there were no plans to move to Tennessee. I believe this is probably what Carpenter refers to in her testimony as a statement by Nelson, in response to a question, to the effect the Company would not be moved if the Union got in. Sheckles' testimony that Nelson mentioned Tennessee as one of the optional locations to which the plant could possibly be moved does not contradict Nelson's expression of no present intention to so move the facility.

The testimony of Wisdom, Hornbeck, and Etherton to the effect Nelson said Whirlpool would not contract with Soltech if Soltech had an incumbent union is credited. Etherton's additional credible testimony that Nelson told the employees Whirlpool had asked if there was a union at Soltech is supported by the fact that the *Supplier Organization Data Sheet* that Whirlpool requires Soltech and other suppliers to fill out asks whether there is union representation, when the collective-bargaining agreement expires and what does it provide that would permit a work stoppage during its terms, and the supplier's labor relations history with particular reference to strikes. I agree with General Counsel that Nelson's comments concerning Whirlpool's purported aversion to contracting with unionized employers amount to a prediction of a prospective loss of employment generated by Whirlpool business if the Union's efforts were successful. The Supreme Court pointed out in *Gissel*[9] that employer predictions concerning the adverse impact on its business by unionization ''must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control,'' and that conveyance of this belief, even if sincere, is not a statement of fact unless those consequences are capable of proof. Respondent has not shown by any reasonable modicum of probative evidence that Nelson's prediction is or was based on objective fact. The *Gissel* test has not been met by Respondent, and Nelson's prediction is accordingly found to be a threat of loss of business in the event of unionization and therefore coercive and restraining in violation of Section 8(a)(1) of the Act. In so finding I am aware the complaint does not specifically allege Nelson made such statements. Nevertheless, the matter was litigated and is closely related to other complaint allegations, i.e., Nelson's other remarks at the meeting, and a finding of violation is warranted.[10]

---

[8] See, e.g., *Cannon Industries*, 291 NLRB 632, 635 (1988).

[9] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969).

[10] See, e.g., *Crown Zellerbach Corp.*, 225 NLRB 911, 912 (1976).

Prior to the onset of the union activity Respondent had a practice of holding meetings with small groups of employees to explain company policies, discuss operational changes, listen to the various questions and concerns raised by employees, and thereafter make efforts to provide answers and remedy outstanding concerns relating to wages, hours, and working conditions. It does not appear however that Nelson regularly or often attended such meetings prior to April 1990. At the close of the meeting discussed above Nelson announced he would be holding small group meetings with plant employees in an effort to discover and resolve their problems.[11] Sheckles and Etherton credibly recall that Nelson stated he was doing this as an alternative to dealing with the Union. That this was indeed Nelson's purpose is indicated by the fact he was personally going to, and did, conduct such meetings and the further fact this announcement was an integral part of a meeting called to counteract the advent of union activity. This indication is confirmed by the credited testimony of Sheckles and Etherton that Nelson plainly stated that he was holding the meetings to avoid union participation in the problem solving. In the context of a meeting designed to forestall union activity, the extraordinary announcement, following other statements opposing the Union, that Respondent's president was personally embarking in a series of meetings to ascertain and resolve employee concerns clearly conveyed the message said meetings would make union representation unnecessary by providing the employees with relief, directly from Respondent's highest official, superior to that a union could secure and, by so doing, violated Section 8(a)(1) of the Act by promising to solicit and remedy employee complaints and grievances in order to dissuade them from selecting the Union as their representative. The meetings were in fact held and, as in the past, changes in managerial assignments and its employee warning system resulted. Were it not for Nelson's advice to employees at the first meeting concerning Respondent's opposition to unionization and the efforts Respondent would exert to defeat unionization, including small meetings conducted by him personally in order to perfect that defeat, I would be inclined to the view the meetings and resultant changes were consistent with past practice and a lawful continuation thereof. Nelson, by his personal assumption of leadership in soliciting and remedying employees' complaints for the purpose of defeating union organization, converted a legitimate business tool into a process tainted by unlawful motivation and violative of Section 8(a)(1) of the Act.

After the first meeting on or about April 21, at about 11 a.m., Nelson came to the machine where Sheckles and Etherton were working and apologized to Sheckles for cutting him off at the meeting, explaining that he ignored him because Sheckles was speaking positively about the Union. Nelson added that his father had once been discharged for stating his beliefs and this could possibly happen to someone else. Nelson's comments on this occasion are not alleged as violations of the Act, but I find he did in fact warn Sheckles of possible reprisals for his prounion stance. At about 2:30 p.m. the same day, Rod Hill also visited Sheckles and apologized for curtailing his questions at the meeting. Hill, like Nelson, said the reason was Sheckles' positive comments about a union at a time Respondent was trying to resolve the issue without being unionized. There was further conversation concerning employee problems. During this conversation, which lasted about an hour, Hill asked Sheckles if he knew who called the Union. Sheckles said he did not.[12] The interrogation of Sheckles by a company vice president with respect to the identity of the initiator of the union campaign was clearly coercive and violative of Section 8(a)(1).[13]

Within a few days thereafter, on or about April 23, Tracy Shain, Respondent's employee until September, was interviewed for employment by Barbara Canter, then Respondent's agent, who told Shain the Union was trying to get in, and then asked Shain how she felt about it. Shain gave a noncommittal answer. Canter's question is not alleged to be a violation of the Act. It does, however, underscore Respondent's concern about the union sympathies of its employees. Shain attended three orientation meetings for new employees within a period of approximately 3 weeks after her interview by Canter. The attending employees were addressed by Nelson and Hill. According to Shain, Hill advised Respondent was looking for a place in Tennessee and would move if the Union came in, adding that Respondent had previously had its facility in Indiana but left there because a union was trying to get in. Hill recalls being asked by an employee during a meeting whether Respondent would move the plant, and responding that was not a choice Respondent was going to have to make at the time and if there was a union ''We'' did not know what would take place. Hill acknowledged that Soltech moved its facility from Jeffersonville, Indiana, to Shelbyville, Kentucky. Shain's testimony on this topic had the ring of truth, was delivered with certainty, has not been rebutted, and is credited. Hill's statement was a direct threat of plant removal buttressed by the advice Respondent had previously moved its facility to avoid unionization. Such a statement is coercive when delivered by an agent of an employer and is even more so when that agent occupies a high management position as Hill did at the time. Accordingly, I find Hill threatened plant removal in retaliation for employee union activity and therefore violated Section 8(a)(1).

During one of the meetings with employees, Hill reported that Whirlpool had asked if Soltech was a union company. He then commented that he believed Respondent would get the Whirlpool contract because Respondent was a nonunion firm. This testimony by Sheckles, who is credited, gains some support from the established fact Whirlpool did ask for such information on its form for suppliers to fill out, and by Hill's testimony that he told employees Respondent was being questioned by a large company, which he advises was indeed Whirlpool, concerning whether there was a union, what union activity was there, and were there any strikes. I do not believe either version contains an unlawful threat of reprisal or force or promise of benefit. At most, all Hill did here was state a fact concerning Whirlpool's questions, and express an opinion, which was clearly identified as his personal opinion, that Respondent would get the contract. This

[11] Wisdom, Sheckles, and Etherton are credited on this point.

[12] Sheckles' testimony, corroborated in significant part by Etherton, concerning the visits of Nelson and Hill is credited.

[13] Compare *Spartan Plastics*, 269 NLRB 546 (1984), where the employer interrogated employees concerning the authorship of a questionnaire which was the product of protected activity, and see *Salvation Army Residence*, 293 NLRB 944, 945, 973 fn. 107 (1989), where inquiries concerning the identity of employees supplying union authorization cards was held unlawful.

strikes me as a statement protected by Section 8(c) of the Act.

About 2 weeks after the first meeting, Hill visited Sheckles at his work station and again asked him if he knew who had called the Union, and therefore again violated Section 8(a)(1) of the Act.

C. *Alleged Violations of Section 8(a)(3) and (4) and Related Conduct*

1. The June 28 written warnings

On June 28, Sheckles, Etherton, and about 10 other employees wore union buttons to work. The buttons were approximately 2-1/4 inches in diameter, bore the Union's logo along with two eyes and a mouth turned up in a smile, and proclaimed ''Smile'' at its top and ''The Teamsters Are Coming'' above ''Local 89'' at its bottom. Nelson, Hill, and Lyons all visited Sheckles and Etherton that day and observed them wearing the buttons. Later that day, in the afternoon, Sheckles was called into the office with Hill and Lyons, and was presented with the following document:

FINAL WRITTEN

EMPLOYEE WARNING NOTICE

1st Notice [ ]
2nd Notice [x]
Name: *Mark Sheckles* Date: *6/28/90*
Dept.: *1st Shift* Clock No.: *1088*

NATURE OF VIOLATION	REMARKS
[ ] Defective Work	Violation of Company Rule C-9, ''knowingly restricting production.'' Further behavior of this nature forfeits employee's right to employment at Soltech.
[ ] Safety	
[x] Conduct	
[ ] Lateness	
[ ] Absence	
[x] Attitude	
[ ] Housekeeping	
[ ] Disobedience	
[ ] Carelessness	

Signature of Forman or Supervisor
/s/ R Walter Hill
Official Signature

The reverse side bears the following notation:

> Employee was observed by co-workers and supervisory personnel deliberately standing around talking and not working during scheduled work period.

Sheckles refused to sign this warning notice. An identical warning was issued to Donna Etherton by Hill and Lyons, differing only in name and clock number. She also refused to sign. Etherton and Sheckles testify, and I find, that they were told by Hill the warning was issued because Lyons observed that the press manned by Sheckles and Etherton had not been running for 10 minutes. Sheckles credibly testified that Hill told him the press had not started until 12:10 p.m., 10 minutes after the lunch period ended. Sheckles and Etherton deny the 10-minute shutdown. Neither had received any previous written warnings concerning their work performance.

According to Hill, the fact the two employees may not have produced as highly as other employees was not a consideration in his decision to issue the warnings. Hill explained the warnings were for what he considered to be loafing, and a failure to make rate had nothing to do with his decision which was based on information reported by Lyons and, says Hill inconsistent with his assertion production was not a factor, a chart developed by Production Manager Cole indicating Sheckles and Etherton were not producing at levels they were capable of or that were comparable to other shifts. Hill, as does Lyons, refers to incidents prior to June 28 when employees Doris Clark, Lynn LaMar, and another complained to him that Etherton and Sheckles were not working. There is no credible evidence Hill ever approached or reproached Etherton or Sheckles concerning these allegations.

Respondent called LaMar and Clark as witnesses. LaMar gave no testimony confirming the claim she complained to Hill or Lyons prior to June 28. As LaMar remembers it, she and Tracy Shain were working on the mezzanine directly above Sheckles and Etherton on June 28 when Lyons came to the area several times for the purpose of watching Sheckles and Etherton at work. LaMar says Sheckles and Etherton were ''goofing off'' by standing and talking to each other. Refreshed by General Counsel via a statement she previously gave to Soltech, she further recalled that Alan Faulkner, maintenance supervisor, was present and talking to Sheckles and Etherton. This recollection agrees with Sheckles' and Etherton's testimony that Faulkner was at their work station several times in June and July discussing problems with their machines.

Doris Clark, a current employee of Respondent, recalls that Lyons, while at her machine on June 28, conceded he was watching Etherton and Sheckles. She further states that Etherton and Sheckles were indeed standing at their machine not producing. She gave a written statement to Lyons on that day reflecting Etherton and Sheckles were out of production about 15 minutes before Lyons saw them. She states they were shut down until lunch time, and agrees a maintenance man was with them off and on that morning. She does not say whether she had previously talked to Hill or Lyons regarding Etherton and Sheckles.

Tracy Shain, a former employee who worked with LaMar on the mezzanine, testified credibly that Lyons came to the mezzanine, watched Etherton and Sheckles from above, and asked Shain if she would sign a paper stating she had seen them standing around. She agreed to and signed a sheet of paper so stating. Later Lyons asked her to sign another statement worded like that of LaMar. She did so. That document, the only one of the statements given the Company by Shain, LaMar, and Clark which was offered in evidence, reads as follows:

> I Tracy Shain saw Mark & Donna standing around their presstalking to one another on more than one occasion. Pee Wee came up on the Mezz. and was walking around by the edge and I asked him if he came up to check on us he said no not you all then we said well, we know who then Mark & Donna—he neither agreed nor

> nor disagreed then asked us if we would sign a paper, went down to get a paper we signed stating that we saw Mark & Donna standing around.
>
> /s/ Tracy L. Shain
> 6-28-90

Shain offered nothing to support the claims of Hill and Lyons that she had previously complained to them about the conduct of Etherton and/or Sheckles.

Lyons wrote the following memorandum concerning his surveillance and investigation of Sheckles and Etherton:

> I walk down by Line 2 and Doris called me over to the press about a problem she was haveing [sic] on job #173. I talked to Doris about the glass and how the parts was cutting. Doris asked me a question and I told her to wait a minute I am looking at something. She said I know you are watching Mark & Donna standing around talking and notworking. I stood their for about 15 minutes than I walked up to the front of the plant and watched them still standing around and talking.
>
> /s/ William Lyons
> 6-28-90

> I walked upon the mezz and Lynn and Tracy asked me if I was watching them. I told them no and the said we know you are watching Mark & Donna standing around talking. I asked them if they would sign a paper to that and they said yes.
>
> /s/ William Lyons
> 6-28-90

There is no persuasive evidence to support Respondent's contention that employee complaints were a motivating factor in the surveillance of Etherton and Sheckles. Employees did indeed testify that Etherton and Sheckles loafed on the job, encouraged others to loaf, and made statements to the effect Respondent dare not discharge them. There is no credited evidence, however, that this conduct was reported to Respondent prior to the June 28 incident or before the discipline therefor. Nor is there any evidence Respondent ever before embarked on such an investigatory effort merely to document employee loafing. Lyons complained to Sheckles earlier in June that he was tired of people trying to get him to do their dirty work. His denial that he so said is not credited. The surveillance of Sheckles and Etherton and the soliciting of written statements concerning their alleged loafing may well have been, and I suspect probably was, the type of ''dirty work'' Lyons disliked.

There is considerable evidence that Respondent has tolerated lengthy pauses in production by employees, and even took part in it, all without issuing any warnings or otherwise disciplining anyone. Thus, William Wisdom credibly relates that he often took time away from production to talk and tell jokes to supervisors as often as two or three times a week, and, during the spring and summer of 1990, he played comedy tapes of 20 to 30 minutes in length for Lyons and supervisor Jack Hearst during his working time, and got into no trouble for so doing. Lyons does not deny Wisdom's testimony, and Hearst was not called as a witness. Tracy Shain credibly testified Lyons was present when she and LaMar stood around goofing off but he never told them to get to work. The testimony of Etherton and Sheckles that Lyons and Hearst visited with Sheckles daily to talk about sports and other topics unrelated to work is uncontroverted and credited. No warnings or other discipline were issued for these frequent lapses in production caused by purely social conversations with supervisors. I further find that Lyons did not, as he claims, orally warn Etherton and/or Sheckles twice before causing Hill to issue the written warning. Their testimony to the contrary is credited. In addition to this history of employees stopping work to hold purely social conversations without any discipline exacted against them, the record shows the employee the others agree was consistently absent from her machine far more often than any other employee received no discipline other than the two oral warnings Lyons, her brother-in-law, claims he gave her.

The prounion activity of Sheckles and Etherton of which Respondent was well aware by virtue of Sheckles' outspokenness and the wearing of the union buttons by both, Respondent's expressions of opposition to union organization, the timing of the warnings within hours of Respondent's discovery these employees were wearing the union buttons, the issuing of a second warning when no first warning had been given, the singling out of these two employees for special observation and warning for alleged misconduct of a type which was frequently engaged in by other employees, and the failure to consider the fact the machine operated by Sheckles and Etherton was the subject of attention by Respondent's maintenance people because it was not operating correctly on June 28 are sufficient to constitute a prima facie showing the June 28 written warnings were motivated in part by antiunion considerations.

Respondent's efforts to rebut not only fail, but strengthen General Counsel's case. The evidence is convincing that Respondent deliberately set out to construct a case against the two by conducting an unprecedented program of surveillance to gather colorable evidence for its purported reasons for the warnings, even to the extent of soliciting written statements from employees and, as shown by the request that Shain conform her statement to that of LaMar, insuring that they uniformly portrayed Sheckles and Etherton as deliberate loafers. To further support this position, Hill and Lyons gave unsupported and uncredited testimony implying that the complaints of other employees were an element leading to the investigation and subsequent warnings. That Respondent manufactured its excuse for the warnings is further indicated by the fact that prior to the union campaign Respondent's supervisors regularly visited employee work stations, engaged in social conversations of lengths up to 30 minutes during which time no production was performed, and did not warn employees to return to productive work. Moreover, the failure to do more than mildly remonstrate with the employee most often absent from her machine demonstrates the lack of consistency in Respondent's application of discipline. General Counsel cogently notes, and I agree, that it seems unusual that Respondent applied Company Rule C-9 re ''Knowingly restricting production,'' when Rule A-4 ''Wasting time or loitering'' seems more apropos even if Sheckles and Etherton were guilty of the conduct charged against them. This is significant because ''C'' Rules violations may be dealt with in a single step which is ''Up to and including discharges,'' whereas violations of ''A'' rules are to be handled through a four step progression of oral warning, written

warning, disciplinary layoff, discharge. I am persuaded that the ''C'' rule was applied in order to permit the written warning to promise discharge for the next violation. The ''A'' rule would only permit a 3-day layoff for a repeat of the offending conduct.

For the reasons set forth above, I conclude and find Respondent has not shown that the written warnings to Sheckles and Etherton would have issued absent their union activity, has therefore not rebutted General Counsel's prima facie case, and General Counsel has shown by a preponderance of the credited evidence that Respondent violated Section 8(a)(3) and (1) of the Act by issuing written warnings to Sheckles and Etherton on June 28, 1990, in order to discourage union membership and activity.

2. The termination of Etherton

Donna Etherton was discharged effective July 11, 1990. Her separation notice specified the reason as insubordination under Company Rule C-9. This seems unusual inasmuch as C-9 is the rule re ''Knowingly restricting production.'' C-3 is the rule on subordination. Whatever the reason for this curious mixup of numbers and reasons, it is clear that Respondent contends Etherton was discharged for insubordination. There were several witnesses to the incident giving rise to her discharge. Their testimony differs in various particulars.

Etherton testifies that she arrived at work about 6:50 a.m on July 11. When she met Sheckles, she told him she was thinking of going home because she did not feel well. As the two entered the plant, they were told by another employee their press would not be running that day. Then, says Etherton, she went to Lyons' office, told him she knew the press was not running, and said she wanted to go home because she was not feeling well. Sheckles and Jack Hearst were also present. She clocked out. Lyons said that it would be held against her if she left. She responded that her attendance record was good so her absence would not hurt her. Then she and Sheckles went to the office of Joan Cheatham, the production scheduler, who told them she did not know why they were not to run production that day. Etherton then told Sheckles she was going home. He first laughed and said he was going home, but then said he would check to see if he could run a punch press. As Etherton then started to leave, Jack Hearst asked her to run the block saw. When she advised she had clocked out, employee Pam Colter volunteered to run the block saw. As Etherton then passed Lyons, she told him she was leaving. Lyons said, ''Well, you know it's going to be held as a day against you.'' She responded that her absenteeism record was not in trouble and she would see him tomorrow, to which he replied he would see her tomorrow. Etherton denies saying that she was going home to lie by her pool or that she did not do grade 2 work because she was a grade 3 employee.

Sheckles' version follows. After they had clocked in and found their press was not scheduled, he and Etherton went to Cheatham's office to see why they were not going to work. Cheatham said she did not know. Sheckles then told Cheatham that he thought he would go home. Cheatham responded that she did not want him to go home. Etherton chimed in that she did not feel well and Sheckles could not go home because she was going home. The two returned to talk to Lyons. Sheckles volunteered to run a punch press, which he did that day. Etherton told Lyons she was not feeling well and was going home. Lyons told her, ''Well, Donna, I can't let you go. I'll have to hold it against you.'' Etherton replied, ''Well, I'm fine in my attendance. Just go ahead.'' and clocked out. Supervisor Hearst then came on the scene and said he needed two people to run a block saw. When Sheckles told Hearst that he was going to run the punch press, Hearst turned to Etherton and said, ''Well, what about you Donna?'' Etherton replied she was not going to run the block saw because she was going home. She then told Lyons, who was present, in a joking manner that if she clocked back in she would run it. She then left the building.

Lyons' version, like Sheckles', is consistent with that of Etherton up to the point where Hearst came looking for block saw operators. Lyons testified that when Hearst came in and said he needed Sheckles and Etherton on the block saw, Etherton said she was a grade 3 employee and should not have to do the block saw job because it was only a grade 2 position. She added it was hot at the block saw. Hearst offered to get her a fan. She left the office, Lyons followed her to the exit, when he caught up with her, she turned, laughed hard, grabbed her stomach, and said, ''Well, I'm sick.'' Lyons said, ''Donna it's going to be held against you.'' She repeated, ''Well, I'm sick,'' got in her car and left.

Jerry Rutter, who was then Respondent's third-shift supervisor, was in the office with Lyons and Hearst when Sheckles and Etherton were present. He recalls Etherton saying something to the effect she did not want to work that day. To which Lyons replied there was work for her to do. She then said that if her machine was not working she was not going to work that day. She was then told she was needed on the block saw. She responded with ''Well, I'm not working on that block saw, because I'm a Grade Three and that's a Grade Two plus, it's too hot, I think I'll just go home and lay out by my pool.'' Either Lyons or Hearst promised to get her a fan. She then left, followed by Lyons.

Cheatham, the production manager, recalls that when she confirmed their press was not running, Etherton suggested to Sheckles that they clock out and take a vacation day. Cheatham interjected that she needed them because she had other work for them. Neither mentioned the heat or being ill.

Later that day, Lyons told Hill that Etherton had refused to work and left. Hill then discussed the matter with Lyons, Rutter, and Hearst to determine what had happened. It was decided to call Etherton in the following day to give her a hearing and get her explanation. That afternoon Sharon Shannon, Respondent's employee relations manager, called Etherton and advised her that she had been scheduled for a hearing the following morning.

When Etherton appeared at Respondent's for the hearing on July 12, she immediately announced that she knew she was going to be fired and those present should just go ahead and do it. She was in an extremely agitated state, but was persuaded to sit down. Urged to explain her conduct, she mentioned it was too hot, she did not feel good, she knew others had refused to do work, and she did not have to do the grade 2 job. She was asked to leave the room while Hill, Lyons, Rutter, Hearst, and Barbara Canter discussed the matter. She was called back in and discharged for insubordination, i.e., refusing to work.

Etherton clearly was neither excused from working nor given permission to leave on July 11. No one but Etherton

testified that Lyons told her that leaving would be treated as a day's absence, and I find that, although he did tell her that he would have to hold her leaving against her, he did not say it would be ''held as a day against you'' thereby implying it would merely be treated as a day's absence from work. Moreover, I do not credit her testimony that she left because she was ill. She came fully prepared to work, and only decided otherwise when she was faced with performing a task other than her regular work. There is no indication she would have pleaded illness as an excuse for absenting herself from her regularly scheduled work that day, and I am persuaded she was not in fact ill and only feigned illness as an excuse for rejecting block saw work. She had determined not to work that day if she could not work on her assigned machine. Lyons gave her fair warning that her refusal to work would be used against her. That she construed the possible consequences to be no more than a warning for an absence does not mean Lyons construed it that way. I find it difficult to believe that Etherton actually believed she could blithely refuse to work, posit a fictitious excuse therefor, and escape any consequential discipline. Her conduct at the outset of the meeting the following morning shows that she in fact knew she was in danger of discipline as serious as discharge. This is not surprising because Company Rule C-18 authorizes discharge for leaving the premises during working hours without authorization, and other employees had been discharged for insubordination, including Sheila Durbin, a 3-year employee, who was discharged in February 1990 because she quit work and left the plant contrary to supervisory instruction. It may be that when she went home on July 11 she believed, as employee testimony indicates she stated, that her union activity insulated her from serious discipline. If she did so believe at the time of the refusal, it is clear from her opening comments on July 12 that she had by then been disabused of that idea.

Given her union activity, Respondent's knowledge of her sympathies, Respondent's hostility toward union activity, and the discriminatorily motivated warning issued to her in June, a question arises concerning Respondent's motives for discharging Etherton. There is enough evidence to conclude that because of her union support Respondent would not be unhappy if Etherton were no longer its employee. It is well established however that even if an employer is eager to get rid of an employee because of his or her union sympathies and is looking for a colorable reason to do so, that employee may be lawfully discharged if he or she engages in conduct for which he or she would have been fired in the absence of union activity.[14] Similarly *Wright Line*[15] teaches that when the General Counsel makes out a prima facie case of unlawful discharge, which I am not entirely sure he has here done, Respondent may yet prevail if it can prove it would have taken the same action in the absence of protected activity.

It is a close question, but I conclude the evidence requires a conclusion Etherton was in fact fired for insubordination which she engaged in even after being cautioned not to by Lyons. I further conclude this would have been the case in the absence of any protected activity. In so concluding, I have considered General Counsel's evidence of disparate treatment and find it unpersuasive for the following reasons. General Counsel cites one instance involving Sheckles, two involving Etherton, and one concerning employee Barbara Bower (or Bauer). Sheckles gave uncontroverted and credible testimony that one day in January when he did not feel like working because he was having trouble with the materials he told Hearst he was going home. Hearst responded, ''Fine'' but also said he would have to hold it against Sheckles, who received no discipline for this conduct. Etherton credibly testified that on one occasion she had a headache and was not feeling well because it was extremely hot. She told Lyons she was going home because it was too hot. Lyons directed her to find Hearst and get her paycheck. Etherton refers to another time when Hearst asked her to do a certain job and, when she said she did not want to do it, merely said he would find someone else to do it. She recalls another time when Barbara Bower told Lyons she would not perform certain work, and as a result, was placed on another job while Etherton performed the work Bower declined.

None of these incidents establish a pattern of disparate treatment sufficient to support a finding Etherton's discharge violated the Act. In none of these instances is there any showing the employee involved was needed to do the work he or she left. In all cases there appear to have been sufficient employees to perform the needed operations, and in no instance but possibly the Bower's incident is there a showing of direct challenge to supervisory authority as there is here. In the instant case, Sheckles and Etherton were told they were needed, and Hearst needed two people for the block saw. Sheckles was on the punch press and therefore unavailable. That left Pam Colter, the employee volunteering to work on the block saw, and Etherton who refused. There is no evidence any other employee was available. Unlike the incidents cited by Sheckles and Etherton, the services of Etherton were truly needed and she deliberately acted directly contrary to supervisory direction.

3. The Sheckles discharge

Sheckles was discharged on November 20 for alleged misconduct on November 19, consisting of knowingly restricting production. Respondent adduced evidence that Sheckles had engaged in and advocated such conduct to other employees in October. Sheila Carpenter, Linda Davenport, and Sandra Wentworth gave credible complementary testimony concerning a day in October when they were stripping boards with Sheckles and another employee. On that date Sheckles would only work when supervisors were present. When questioned by the other employees as to why he was not working, he said he need not work because supervision could not check on how much the employees had done, and because he had a lawsuit against Respondent, an obvious reference to the first consolidated complaint in Cases 9–CA–27654 and 9–CA–27837 which issued October 19. Carpenter and Davenport reported Sheckles' comments to Respondent's President Nelson. Wentworth corroborated their report on November 20 when Hill asked her what had happened on that day in October. Nelson credibly testified that Carpenter and Davenport came to him a few days to a week before Sheckles' discharge, and told him Sheckles was taking credit for work

[14] See, e.g., *Stoutco, Inc.*, 218 NLRB 645, 650–651 (1975); *P. G. Berland Paint City*, 199 NLRB 927 (1972); *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966).

[15] 251 NLRB 1083 (1980); enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

he had not performed, would only work when a supervisor came by, and said he did not have to work because he was suing the Company. Their complaint was that Sheckles' refusal to work was not fair to the other employees who did work. After hearing these complaints Nelson personally went to the work floor on November 19 and observed Sheckles and Wentworth, his new helper, just standing there laughing and doing very little work. He observed this for about 45 minutes. Then he called Rutter[16] over and instructed him to watch Sheckles and Wentworth the rest of the day to see if this was the way they regularly performed.

A little later Nelson returned to the floor and observed that Sheckles was still not working as he should be. Sheckles agrees that Nelson was in the area three times and glanced at him. At about 1:30 or 2 p.m., Nelson went to Sheckles' machine. Wentworth was not present during this meeting. Sheckles' testimony concerning what happened is set forth below in relevant part:

> [M]r. Nelson came over to the press, said to me, ''You have your big day in court next week.'' And I said, ''Yes.''
>
> And he said, ''Well, I'm here to tell you this loafing you're doing has got to stop.'' And like I said, I said, ''I was not loafing.'' He said, ''Yes, you are.''
>
> And I said, ''No, I'm not.'' And he said, ''Well, you keep it up,'' he said, ''You're going to find out what's going to happen to you.''

Nelson denies making any reference to the Board proceeding then scheduled for November 27 in Cases 9–CA–27654 and 9–CA–27837, and gives the following version of the conversation:

> I went—went up to Mark, myself, and said, ''Mark, look, you're expected to work here like everyone else, you know we have rules and you have to work. You cannot loaf, you have to run this machine.''
>
> He said ''I'll—he always had a flip remark when you talked to him. ''I'm doing the best I can.'' This is—this is what he, you know, kind of ''Mmm.'' And I said, ''Look, you got to work, or action will be taken.''

Both thus agree that Nelson warned Sheckles his loafing would result in unspecified discipline. I do not credit Sheckles that Nelson just off the cuff said, ''You have your big day in court next week.'' The reason for Nelson's visit to Sheckles was what he perceived to be loafing on the job. It is unlikely that the first thing he would refer to when he went to warn Sheckles about his work was the upcoming hearing. It simply does not make sense. Nelson's account of the reports of Sheckles' loafing and his personal observations have the ring of truth, and are corroborated by other witnesses. He is therefore credited on the matters. Similarly, I credit his denial that he made any reference to future proceedings because he was also more believable than Sheckles on this point. Accordingly, the allegation that Nelson threatened Sheckles with unspecified reprisals because of his involvement in Cases 9–CA–27654 and 9–CA–27837 is dismissed.

[16] Rutter was filling in for Lyons who was not present that day.

Rutter, no longer Respondent's employee but a supervisor at the time of Sheckles' discharge, credibly testified that Sheckles was assigned on November 19 to recut parts from obsolete fibreglass parts that had previously been cut. Sheckles protested that he should not be doing this, but Rutter told him he had to because it was necessary to utilize this obsolete but reusable material. When Rutter perceived Sheckles was making no honest effort to get the job done he several times remonstrated with Sheckles because he was not making satisfactory production. Nelson came out, talked to Sheckles, and agreed with Rutter that Sheckles was not producing as he should.

Respondent's production records show Sheckles and Wentworth produced 2887 units November 19, averaging 295 an hour. Respondent's records also show that Wentworth, working alone after Sheckles' discharge, performed the job with the same type material on November 29 and produced 4320 units, an average of 665 per hour. The material, as Sheckles, Hornbeck, and Wentworth agree, was not as easy to work with as the regular rolls of material and had a tendency to pull apart when used in the machine and was so pulling apart on November 19. This does not explain, however, why Wentworth working alone had a bigger hourly output than Sheckles working with her. The explanation I believe lies in Wentworth's succinct evaluation that Sheckles ''was goofing off and stuff all day long.''

On November 20, Sheckles was given a hearing. Present were Rod Hill, Jerry Rutter, Thomas Nelson, and Lynette Dawn, employee relations manager. Hill conducted the meeting. Nelson recalls Hill reminded Sheckles he had a previous warning for restricting production. Sheckles acknowledged that he had. (Rutter testified before me that he did not know until the company hearing that Sheckles had been given a previous final written warning, and only planned to give him a written warning which he did not know would be a final warning.) Hill then said employees had complained that Sheckles was slowing production down and not working, and this conduct had happened before. Sheckles made no response, and Hill was told he was terminated for the C-Rule violation. Sheckles got up, laughed, and said, ''See you all in court,'' and left. Sheckles agrees with Nelson's account of what Hill said, adding that Hill also said Nelson had seen him loafing on the job and they were not going to stand for it. Sheckles does not refer to his alleged parting statement. Rutter testified Sheckles did say, as he left, that he would see them all in court.

Wentworth also had a hearing and was issued a ''Final written warning'' for knowingly restricting production. When Hill gave her the warning and said it was because they were not working, she said it was Sheckles fault because he was the operator.

The evidence warrants a finding Sheckles was in fact not operating as fast as he could have, and this was deliberate. He was, I conclude, knowingly restricting production, but I do not believe this alone would have caused his discharge. Respondent has made no convincing showing or argument that Sheckles would have been discharged in the absence of the earlier warning. Rutter's expectation that Sheckles would only get a written warning for his conduct, Respondent's reliance, as expressed by Hill to Sheckles, on the June 28 warning as a reasons for its November 20 decision, and Respondent's contention in its posttrial brief that this was

Sheckles second ''bite at the apple'' fairly establishes that in the absence of the June 28 warning Sheckles would have only received a written warning on November 20 as did Wentworth. Reliance on a warning issued in violation of the Act as a motivating factor for a subsequent discharge is sufficient to establish a prima facie case the discharge violates the Act. Respondent has not shown Sheckles would have been discharged in the absence of the earlier warning. I therefore find the General Counsel has shown by a preponderance of the credible evidence that the discharge of Sheckles violated Section 8(a)(3) and (1) of the Act because it was partially premised on conduct designed to discourage union activity and membership. The evidence does not, however, support a finding that Section 8(a)(4) of the Act has been violated.

CONCLUSIONS OF LAW

1. Respondent, Soltech, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By promulgating and maintaining an overly broad rule against distribution, Respondent violated Section 8(a)(1) of the Act.

4. By threatening employees with plant closure or removal if they select a union to represent them, Respondent violated Section 8(a)(1) of the Act.

5. By implying to employees that the selection of union representation would be futile, Respondent violated Section 8(a)(1) of the Act.

6. By threatening a loss of business in the event its employee select union representation, Respondent violated Section 8(a)(1) of the Act.

7. By promising to solicit and remedy employee complaints and grievances in order to dissuade them from seeking union representation, Respondent violated Section 8(a)(1) of the Act.

8. By soliciting and remedying employee complaints and grievances in order to dissuade them from seeking union representation, Respondent violated Section 8(a)(1) of the Act.

9. By coercively interrogating employees concerning their and other employees union activities or sympathies, Respondent violated Section 8(a)(1) of the Act.

10. By issuing final warnings to Mark Sheckles and Donna Etherton on June 28, 1990, in order to discourage union membership and activity, Respondent violated Section 8(a)(3) and (1) of the Act.

11. By discharging Mark Sheckles in order to discourage union membership and activity, Respondent violated Section 8(a)(3) and (1) of the Act.

12. The violations of the Act set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

13. Respondent did not engage in any other unfair labor practices alleged in the complaint.

THE REMEDY

In addition to the usual cease and desist and notice posting requirements, my recommended Order will require Respondent to offer unconditional reinstatement to Mark Sheckles, and make him whole for all wages lost as a result of his unlawful discharge, such backpay to be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent will also be required to remove from its files any reference to the June 28, 1990 warnings issued to Mark Sheckles and Donna Etherton and the discharge of Mark Sheckles, and notify them in writing that this has been done and that evidence of the unlawful discharge and warnings will not in any way be used against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Soltech, Inc., Shelbyville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating or maintaining any rule or other prohibition which forbids distribution of union literature by employees on their own time in nonworking areas.

(b) Threatening employees with plant closure or removal if they select union representation.

(c) Implying to employees that union representation would be futile.

(d) Threatening a loss of business if the employees select union representation.

(e) Promising to solicit and remedy and in fact soliciting and remedying employee complaints and grievances in order to dissuade them from seeking union representation.

(f) Coercively interrogating employees concerning their or other employees union activities or sympathies.

(g) Discharging or issuing warnings to employees in order to discourage union membership and activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Mark Sheckles immediate and full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings suffered by reason of his unlawful discharge in the manner set forth in the remedy section of this decision.

(b) Remove from the records of Mark Sheckles and Donna Etherton any reference to the discharge of Mark Sheckles and the June 28, 1990 warnings issued to Mark Sheckles and Donna Etherton, and notify them in writing that this has been done and that evidence of these warnings and discharge will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records required to analyze the

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

amount, if any, of backpay due under the terms of this Order.

(d) Post at its place of business located in Shelbyville, Kentucky, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or warn employees, or otherwise discriminate against them in any manner with respect to their tenure of employment or any term or condition of employment because they engage in union or other concerted activities protected by the National Labor Relations Act.

WE WILL NOT promulgate or maintain any rule or other prohibition which forbids distribution of union literature by employees on their own time in nonworking areas.

WE WILL NOT interrogate employees concerning their union activities or sympathies or those of other employees.

WE WILL NOT threaten plant closure or removal or a loss of business if employees select union representation.

WE WILL NOT promise to solicit and remedy nor will we in fact solicit and remedy employee complaints or grievance in order to dissuade them seeking union representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by the National Labor Relations Act.

WE WILL offer Mark Sheckles immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of our discrimination against him, with interest computed thereon.

WE WILL withdraw the written warnings issued to Mark Sheckles and Donna Etherton on June 28, 1990.

WE WILL remove from our files any reference to the discharge of Mark Sheckles or the warning issued to Mark Sheckles and Donna Etherton on June 28, 1990, and notify them in writing that this has been done and that evidence of these unlawful actions will not be used against them in any way.

SOLTECH, INC.